

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 15, 2008

JOSEPH MILES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Robertson County
No. 96-0237 John H. Gasaway, III, Judge

No. M2008-00506-CCA-R3-PC - Filed March 26, 2009

Petitioner, Joseph Miles, was convicted of second degree murder and sentenced to forty years as a Range II violent offender. His subsequent direct appeal, petition for post-conviction relief, and post-conviction appeal were unsuccessful. On February 27, 2007, Petitioner filed a motion to reopen his petition for post-conviction relief based upon the United States Supreme Court rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2005), and *Cunningham v. California*, 594 U.S. 270 (2007). The post-conviction court denied Petitioner's motion. Petitioner filed a notice of appeal with the trial court. Because Petitioner did not follow the requirements as set out in Tennessee Code Annotated section 40-30-117(c), which requires an application for permission to appeal to this Court for appeal from a denial of a motion to reopen, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal is Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., joined, and ROBERT W. WEDEMEYER, J., not participating.

William Kroeger, Springfield, Tennessee, for the appellant, Joseph Miles.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; John Carney, District Attorney General, and Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On May 21, 1999, Petitioner was convicted by a jury of second degree murder. *State v. Joseph Miles*, No. M1998-00682-CCA-R3-PC, 2001 WL 166368, at *1 (Tenn. Crim. App., at Nashville, Feb. 16, 2001), *perm. app. denied*, (Tenn. June 18, 2001). At a subsequent sentencing hearing, the trial court sentenced Petitioner to forty years as a Range II violent offender. *Id.* On appeal, Petitioner challenged the sufficiency of the evidence and his sentence. *Id.* This Court

affirmed the Petitioner's conviction and sentence on appeal. *Id.* at *11. On December 4, 2001, Petitioner filed a petition for post-conviction relief. *Joseph Miles v. State*, No. M2003-01871-CCA-R3-PC, 2005 WL 2438392, at *1 (Tenn. Crim. App., at Nashville, Sept. 26, 2005). In his petition, he alleged that both his trial and appellate counsel were ineffective. *Id.* The post-conviction court denied the petition. *Id.* at *3. On appeal, this Court affirmed the post-conviction court's denial of the petition. *Id.* at *7.

On March 14, 2005, while Petitioner's appeal from the post-conviction court's denial of his original petition was still pending, Petitioner filed a "Motion to Re-open Petition for Post-conviction Relief." In his motion to reopen, Petitioner argued that his Sixth Amendment right to a jury trial was violated pursuant to *Blakely* because enhancement factors used to increase his sentence above the minimum were found by the trial court as opposed to the jury. On May 5, 2005, the trial court denied and dismissed Petitioner's motion. The trial court based its ruling upon *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) ("*Gomez I*"), in which our supreme court held that the Tennessee sentencing statute did not violate the holding in *Blakely*.

On February 27, 2007, Petitioner filed a second Motion to Re-open Petition for Post-conviction Relief. Petitioner based this motion upon the United States Supreme Court's ruling in *Cunningham* which caused our supreme court to revisit *Gomez I*. In *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) ("*Gomez II*"), our supreme court held that the Tennessee sentencing statute in effect at the time *Blakely* was filed did violate a defendant's Sixth Amendment right to trial by jury.

On February 15, 2008, the post-conviction court held a hearing on Petitioner's second motion. At the hearing, Petitioner argued that the Supreme Court's holding *Blakely* applied to his sentence. He based his argument on the fact that *Apprendi* was decided while his direct appeal was pending and the decision in *Apprendi* was the basis for the *Blakely* decision. Therefore, according to Petitioner, the holding in *Blakely* which was applied to the Tennessee sentencing scheme in *Gomez II*, should apply to his sentence. The State argued that Petitioner's direct appeal was finalized before the *Blakely* decision and, therefore, *Blakely* should not apply retroactively to his case because it was not a pipeline case. At the conclusion of the hearing, the post-conviction court held that the *Blakely* decision was the ruling which triggered a defendant's rights under the Sixth Amendment with regard to the application of enhancement factors and because Petitioner's direct appeal had been finalized by the time *Blakely* was filed, it would not apply retroactively. The post-conviction court filed an order stating the same on February 15, 2008. Therefore, the post-conviction court denied Petitioner's motion.

On March 5, 2008, Petitioner filed a notice of appeal in the post-conviction court.

ANALYSIS

On appeal, Petitioner argues that the post-conviction court erred in denying his motion to reopen his petition for post-conviction relief because *Apprendi*, which was the basis of *Blakely* and subsequent opinions, was decided while his direct appeal was pending and, therefore, the holdings

of *Blakely* should apply to his sentence. The State argues that Petitioner has waived his appeal for failing to seek a discretionary appeal or in the alternative that Petitioner is not entitled to reopen his post-conviction petition based upon the Supreme Court's holding in *Apprendi*.

Tennessee Code Annotated section 40-30-117 sets out the procedure for defendants to file a motion to reopen and to appeal from the denial of such motion. Tennessee Code Annotated section 40-30-117(c) states:

If the motion is denied, the petitioner shall have ten (10) days to file an *application in the court of criminal appeals seeking permission to appeal*. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion.

(emphasis added).

In this case, Petitioner filed a form entitled "Notice of Appeal" that provided boxes to check and blanks to fill in concerning the court to which the defendant was appealing, the style of the case, the trial judge, and the names of the appellant and appellee. Based upon the title of the form filed the document would not be considered an application seeking permission to appeal as required by Tennessee Code Annotated section 40-30-117(c).

Our supreme court faced a similar situation in *Graham v. State*, 90 S.W.3d 687 (Tenn. 2002). In *Graham*, the petitioner filed a motion to reopen his post-conviction petition based upon *Apprendi*. As in the case at hand, the petitioner filed a document entitled "Notice of Appeal" as opposed to an application seeking permission to appeal as required by the statute.¹ After pointing out that the statute did not specify what constitutes an application for permission to appeal, the *Graham* court stated the following: "In general, the contents of an application for appeal must include the date and judgment from which the petitioner seeks review, the issue which the petitioner seeks to raise, and the reasons why the appellate court should grant review." *Graham*, 90 S.W.3d at 691. The court held that the petitioner's notice of appeal should be treated as an application for permission to appeal because the pleading included a reference to the trial judge's order and the issue to be raised. *Id.*

The same cannot be said of Petitioner's Notice of Appeal in the case at hand. Unlike the notice of appeal in *Graham*, Petitioner's notice of appeal is merely a form and does not include any information regarding the issue to be raised or any reasons why this court should grant review. For this reason, this appeal is dismissed.

¹ At the time *Graham* was decided, Tennessee Code Annotated section 40-30-117(c) was found at Tennessee Code Annotated section 40-30-217(c).

CONCLUSION

For the foregoing reasons, Petitioner's appeal is dismissed.

JERRY L. SMITH, JUDGE